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EDWARD STANISLAUS DE SILVA & ORS v. YENG CHONG REALTY BHD (FORMERLY KNOWN AS YENG CHONG REALTY SDN BHD)

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HIGH COURT MALAYA, KUALA LUMPUR
ROZ MAWAR ROZAIN JC
[CIVIL CASE NO: WA-22NCVC-452-08-2020]
1 AUGUST 2023

C

Abstract – *The doctrine of limitation aims at ensuring that one should not be at risk of a stale claim. The court would not allow a party to conduct itself in ignoring, being unresponsive and taking advantage of time passing to rely on the defence of limitation.*

D

CONTRACT: *Agreement – Sale and purchase agreement – Breach – Specific performance – Vendor and purchasers entered into sale and purchase agreements for purchase of bungalow plots – Failure to deliver vacant possession – Whether there was continuous breach of contract – Whether claim by purchasers statutorily-barred*

E

LAND LAW: *Recovery of land – Fraud and unjust enrichment – Allegations of – Vendor and purchasers entered into sale and purchase agreements for purchase of bungalow plots – Failure to deliver vacant possession – Allegations of elements of fraud and unjust enrichment as vendor had planted oil palm trees on land and benefitted therefrom – Whether allegations supported by evidence – Whether claim by purchasers statutorily-barred*

F

LAND LAW: *Ownership – Beneficial ownership – Vendor and purchasers entered into sale and purchase agreements for purchase of bungalow plots – Failure to deliver vacant possession – Whether vendor bare trustee – Whether question of limitation arose*

G

LIMITATION: *Land – Recovery of land – Vendor and purchasers entered into sale and purchase agreements for purchase of bungalow plots – Failure to deliver vacant possession – When cause of action accrued – Whether limitation had set in – Limitation Act 1953, ss. 6(1) & 9(1)*

H

The defendant had obtained a loan from the Malaysian Building Society Berhad ('MBSB') in 1997 to purchase several plots of land ('land') and the land was charged to the MBSB as security for the loan granted to the defendant. In 1999, the defendant issued flyers, brochures and advertisements in newspapers that it would develop the land into luxurious golf resort bungalow plots ('project'). It was also represented that there was 100% interest-free on 20 monthly instalments and that delivery of vacant possession was 36 months. Based on these representations, the plaintiffs entered into respective sale and purchase agreements ('SPAs') with the defendant to buy the bungalow plots. In 2003, the MBSB filed a civil suit for money owed by the defendant due to the non-service of the loan granted.

I

Whilst the defendant was trying to resolve the legal tussle with MBSB, the defendant failed to deliver vacant possession of the bungalow plots to the plaintiffs. In 2020, the plaintiffs mounted their action against the defendant based on the contentions that: (i) there was a continuous breach of contract as vacant possession had yet to be delivered; (ii) there was an element of fraud as the defendant had never intended to fulfil the SPAs that it had executed with the plaintiffs; and (iii) there was unjust enrichment by the defendant as instead of developing the land as per the SPAs, the defendant had planted oil palm trees and benefitted therefrom. It was the plaintiffs' submission that they had beneficial ownership of their respective bungalow plots as the SPAs had been duly executed and payments were made towards the full purchase price. The defendant, on the other hand, relied on the defence that: (i) the claims were statutorily-barred under s. 6(1) of the Limitation Act 1952 ('Act') as the respective SPAs were executed back in 1999 and 2000; (ii) the facts did not show any fraudulent breach of trust as the particulars of fraudulent breach of trust were limited to the entry of the SPAs and nothing more.

Held (allowing claim in part):

(1) This was not a case where the claim was just on the demand of liquidated damages which were unpaid, thereby breaching the SPAs. The plaintiffs were rightly asking for the delivery of vacant possession and the issuance of the titles of their bungalow plots. This action was an action for the recovery of land. As such, the plaintiffs' claims fell within s. 9(1) of the Act. Hence, the limitation period for this action was 12 years. The only time the defendant had clearly denied and refuted the plaintiffs' claim was on 7 October 2020 when it filed an application to this court for leave to enter appearance and file defence. The cause of action would only arise then. The plaintiffs' claim for the recovery of land was therefore not time-barred. (paras 33, 34 & 69)

(2) The plaintiffs did not fall within the classic scenario of sleeping on their rights which was one of the purposes of the doctrine of limitation. Throughout the years, 11 of the plaintiffs fulfilled their obligations and paid the purchase price in full of the respective bungalow lot they each had entered the SPA into with the defendant. The others had stopped their monthly instalment payments although a substantial portion of the purchase price had been paid upon visits to the land and having witnessed no construction had commenced to develop the project. All of them had sought one way or the other responses and resolutions from the defendant. At the same time, this also was not a situation where the defendant was put into that position of the uncertainty of legal actions as they were aware at all material times of their obligations to the plaintiffs who had sought for their rights through all this time. This was also one of the purposes of the doctrine of limitation – to ensure one

should not be at risk of a stale claim. In this instance, this court would not allow a party to conduct itself in ignoring being unresponsive and taking advantage of time passing to rely on the defence of limitation. (para 70)

(3) Premised on the evidence that the first to the 11th plaintiffs had duly paid the purchase price of their respective bungalow lots in full and that the defendant had accepted it unconditionally as proven by the voluminous official receipts and statements issued, the defendant was a bare trustee of the respective bungalow lots to them. The question of time-bar/limitation period did not arise here. The defendant as a bare trustee, could not in law pass any interest in the property or deal with the bungalow plots of the first to the 11th plaintiffs. Unfortunately, the 12th to the 25th plaintiffs here were not entitled to the declaration that they were the beneficial owners of the bungalow plots which they had not yet paid in full. However, the 12th to the 25th plaintiffs had some equitable rights to their respective bungalow plots. This was premised on the evidence which included the conduct of the defendant in its acquiescence of the plaintiffs to stall their payments until further notice. (paras 75 & 81)

(4) The evidence did not crossover the threshold of fraud and having defrauded the plaintiffs. Further, there was no evidence that the defendant had planted oil palm trees on the land instead of developing the project. There was also no evidence to satisfy the court, on a balance of probabilities, that there were profits made by the defendants from the oil palm plantation on the land on which the project was supposed to have been developed. The plaintiffs' claim to this was dismissed. (paras 89-91)

(5) The SPAs between the plaintiffs and the defendant were continuous and subsisting. The court minded to exercise judiciously by granting the relief prayed for by the plaintiffs as the innocent party for the specific performance by the defendant. The vacant possession must be delivered by the defendant, despite the infrastructure works not even having been commenced. Time was of the essence here – the plaintiffs could not afford to wait much longer for the defendant to construct the infrastructure works which should have been commenced in 1999. The plaintiffs were awarded general, aggravated and exemplary damages as tabulated in para. [99](vii) of this judgment. (paras 94 & 99)

Case(s) referred to:

BJ Homes Development Sdn Bhd v. Lim Lay Imm [2021] 1 LNS 1699 HC ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly Known As Time Engineering Sdn Bhd) [1996] 2 CLJ 561 FC ***(refd)***

CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Economic Development (Low Cost Houses) Sdn Bhd v. Majlis Perbandaran Seberang Perai [2012] 9 CLJ 158 CA ***(refd)***
Golden Approach Sdn Bhd v. Lau Sen Leong & Anor [2019] 3 CLJ 755 CA ***(refd)***
He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***
Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 SC ***(refd)***
Kumaraguru Thandavathevar v. Ooi Soo Teik & Anor [2017] 10 CLJ 129 HC ***(refd)***
Loh Wai Lian v. SEA Housing Corp Sdn Bhd [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223 FC ***(refd)***
Maskiara Property Holdings Sdn Bhd v. Norisham Ibrahim [2022] 1 LNS 266 CA ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Neoh Khoon Lye v. Trans-Intan Sdn Bhd [2002] 7 CLJ 420 HC ***(refd)***
PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***
S & M Jewellery Trading Sdn Bhd & Ors v. Fui Lian-Kwong Hing Sdn Bhd [2015] 8 CLJ 16 FC ***(refd)***
Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***
SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***
Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***
Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(refd)***
Twinsectra Ltd v. Yardley [2002] 2 All ER 377 ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6(1), 9(1)

For the plaintiffs - Nur Atiqah Ahmad Ariff & Viola Lettice De Cruz; M/s VL Decruz & Co
For the defendant - Eidzlan Farhan Nakhrowi & Goh EE Von; M/s Cheang & Ariff

Reported by Lina E

JUDGMENT

Roz Mawar Rozain JC:

Introduction

[1] Taken by the advertisement and representation of the defendant, the plaintiffs were persuaded to buy bungalow plots in Bandar Golden Valley Golf Resort (the project) in 1999. There was no delivery of vacant possession as per their agreements, until to date. The plaintiffs claimed that from the conduct of the defendant, they had never intended to make good representations and contractual obligations, thus alleging fraud on the part of the defendant. The plaintiffs had pleaded unjust enrichment by the defendant

as a result of the execution of the agreements with the plaintiffs and the collection of the payments. The plaintiffs sought for a specific performance by the defendant to deliver vacant possession of their respective bungalow plot and that the individual titles be granted to them, amongst others.

[2] The main crux of the defence was that this action was time-barred. The agreements for the sale and purchase of the bungalow plots with the respective plaintiffs were back in 1999 and 2000. The delivery of vacant possession of the respective bungalow plots were supposed to have been conducted in 2002 and 2003 pursuant to the respective agreements. Thus, the defendant claimed that filing of this suit in 2020 was out of time and the plaintiffs were not entitled to any remedy or relief.

[3] After a full trial, where the purchasers who had purchased every bungalow plot testified for the plaintiffs, this court had also heard the evidence for the defendant from one of its directors. Having assessed the proof adduced, this court allows some of the reliefs sought by the plaintiffs and dismisses the others as guided by the authorities that bound this court.

The Background Facts

[4] The defendant is the registered owner of several plots of land situated in the Mukim Ayer Panas, Daerah Jasin, Malacca (the land). The defendant had obtained a loan from Malaysian Building Society Berhad (MBSB) in 1997 to purchase the land, so the land was charged to MBSB as security for the loan granted to the defendant. The plots of land, which collectively referred to as the land, are:

(i) PN 56600 Lot 4498 (formerly HS(D) No 6070 (PT 1628));

(ii) PN 47269 Lot 4499 (formerly HS(D) No 6071 (PT 1629));

(iii) PN 47170 Lot 4500 (formerly HS(D) No 6072 (PT 1630));

(iv) PN 28841 Lot 4520 (formerly HS(D) No 6053 (PT 4166));

(v) PN 28850 Lot 4521 (formerly HS(D) No 6054 (PT 4167));

(vi) PN 28839 Lot 4517 (formerly HS(D) No 6055 (PT 4168));

(vii) PN 28836 Lot 4524 (formerly HS(D) No 6058 (PT 4171)); and

(viii) PN 28835 Lot 4518 (formerly HS(D) No 6059 (PT 4172)).

[5] In 1999, the defendant had issued flyers, brochures and advertisements in newspapers that it would develop the land into luxurious golf resort bungalow plots known as the project. It was represented that there was 100% interest-free on 20 monthly instalments and that delivery of vacant possession was 36 months. The representation by the defendant was that the development was to be jointly carried out with the MBSB. The defendant had agreed to jointly develop the land with MBSB Development Sdn Bhd, an entity wholly owned by MBSB – this was stated in the recital in the sales and purchase agreements (SPAs) with the plaintiffs.

[6] Based on the defendant's representations, the plaintiffs entered into the respective SPAs with the defendant to buy the bungalow plots. The SPAs were executed between 20 April 1999 and 20 April 2000. The defendant had undertaken that the bungalow plots would be free of encumbrances for the transfer of titles to the plaintiffs (cl. 3) which the defendant had agreed to execute immediately at its own cost (cl. 11). The delivery of vacant possession was to be 36 months from the date of the respective SPAs (cl. 16). The dates for the delivery of vacant possession ranged from 20 April 2002 to 20 April 2003. Damages, otherwise, were to be calculated at 8% per annum. The defendant had also agreed to build the infrastructure of the project at its own cost (cl. 3(2)). The basic infrastructure was defined as (cl. 1(b)):

(i) the main road to the land;

(ii) the main drain;

(iii) the main water reticulation with water tank;

(iv) the sewerage;

(v) the necessary infrastructure for the authorities' provision for electricity and streetlights; and

(vi) the necessary infrastructure for telephone cables.

[7] In 2003, MBSB filed a civil suit for money owed by the defendant due to the non-service of the loan granted. Based on the redemption settlement agreement between them dated 17 April 2014 (D120), the parties had entered into a deed of proposed settlement on 26 October 2010 to settle the claims. Pursuant to a letter dated 11 February 2014, MBSB had offered to settle all pending suits and all amounts outstanding under the loan and on 17 February 2014, the defendant accepted MBSB's terms and conditions – with regard to the land; the defendant agreed to pay in full RM40,000,000 to MBSB and MBSB was to withdraw all its lienholders' caveats over the land. The suit was settled on 19 October 2016 and MBSB had discharged the land as security. Pursuant to the settlement agreement, the defendant was to assume full responsibility to resolve the purchasers' existing claims against MBSB (and MBSB's two subsidiaries). MBSB and its two subsidiaries were fully discharged from any liability which was subsumed by the defendant. The claims pertained to the non-completion of the project.

[8] In the meantime, whilst the defendant was trying to resolve the legal tussle with MBSB, the defendant had failed to deliver vacant possession of the bungalow plots to the respective plaintiffs. The plaintiffs had continued with their monthly instalment payments to the defendant for their respective bungalow lots according to each of their SPAs. After continuous demands, queries and complaints, there were still no delivery of vacant possession of the bungalow plots to the plaintiffs, nor the surrender of the titles to the bungalow plots to the plaintiffs.

[9] In 2020, the plaintiffs mounted their action against the defendant with the contention of continuous breach of contract as vacant possession had yet to be delivered. The plaintiffs claimed that there was an element of fraud as the defendant had never intended to fulfil the SPAs it had executed with the respective plaintiffs. The plaintiff had also pleaded that there was unjust enrichment by the defendant as instead of developing the land as per the SPAs, the defendant had planted oil palm trees and benefitted therefrom. The defendant, on the other hand, relied heavily on its pleaded defence that the claims were statutorily-barred.

[10] The reliefs claimed by the plaintiffs are:

(i) a declaration that the plaintiffs have a beneficial interest in the land;

(ii) a declaration that the defendant held the respective bungalow plots as trustee to the plaintiffs;

(iii) an order that the defendant delivers vacant possession of the respective bungalow to the plaintiffs;

(iv) an order that the defendant applies for the subdivision of the land titles in accordance to the SPAs;

(v) an order that the defendant ensures the issuance of separate individual titles for the bungalow plots;

(vi) an order that the defendant transfers its ownership to the plaintiffs;

(vii) the defendant pays to the plaintiffs the damages as per the SPAs;

(viii) damages for the loss of profit derived by the defendant from the palm oil plantation on the land.

In the alternative, the plaintiffs prayed that:

(i) the defendant refund the purchase price paid by the plaintiffs with the interest of 8%;

(ii) loss of difference in the market price in comparison with the purchase price;

The plaintiffs also claim for:

(i) general damages;

(ii) exemplary damages;

(iii) aggravated damages;

(iv) interests;

(v) costs based on damages; and

(vi) other reliefs this court deems fit.

[11] In challenging the plaintiffs' position that the defendant was under continuous obligations to deliver vacant possession and thus the cause of action was still alive, the defendant submitted that the plaintiffs' claim was time-barred as the respective SPAs were executed back in 1999 and 2000. It was also the defendant's submissions that the facts did not show any fraudulent breach of trust, of which the plaintiffs had relied on to counter the applicability of the Limitation Act 1953. Further to that, the defendant submitted that the particulars of fraudulent breach of trust were limited to the entry of the SPAs, and nothing more. Thus, implored this court to reject the plaintiffs' submissions on the alleged dishonesty on the part of the defendant which was having not updated the plaintiffs on the status of the land. This court examined the facts of this case to make the necessary findings of facts.

The SPAs

[12] Twenty-two plaintiffs testified for all 25 named plaintiffs, some of them jointly executed the SPAs. The defendant called one of its directors. All the plaintiffs testified to the advertisements and representations by the defendant. This fact was not disputed. There was also no dispute whatsoever that the plaintiffs had executed their respective SPAs back in 1999 and 2000. The delivery of vacant possession of the respective bungalow plots was to be conducted not later than 36 months after the execution of the respective SPAs – thereby in 2002 for some and 2003 for the others. That contractual obligation of the defendant in cl. 16(1) of the SPAs is reproduced here:

> Subject to the Purchaser having paid to the Vendor up to date of all the instalments to the stage of completion of the Basic Infrastructure Works as prescribed in the Third Schedule hereto and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement, the Vendor shall let the Purchaser into vacant possession of the said Plot upon completion of the Basic Infrastructure Works referred to in Clause 13 hereof **which in any case shall not be later than Thirty-Six (36) months from the date hereof** (hereinafter referred to as **"Basic Infrastructure Completion Date"**). (emphasis added)

[13] Also agreed to *vide* the SPAs were the terms that cover instances where the plaintiffs had failed to take up the delivery of vacant possession after 14 days' notice from the defendant and that the plaintiffs were not to cut any trees in their respective bungalow plots without first obtaining the consent from the defendant. The condition that the plaintiffs premised one of their reliefs on is found in cl. 16(4) of the SPAs that provided:

> In the event the said Plot is not completed and ready for delivery of vacant possession by the Completion Date, then the Vendor shall pay to the Purchaser liquidated damages calculated from day to day at the rate of Eight per centum (8%) per annum on the Purchase Price of the said

A Plot from the due date of the basic infrastructure completion date to the date of completion of basic infrastructure completion date of the said Plot to the Purchaser.

[14] The defendant did not deliver vacant possession of the bungalow plots to any of the plaintiffs as per the SPAs. Facts testified at trial was that the B defendant had failed to even start commencing the project at all. The first issue to be tried in this case was whether pursuant to cl. 16(4) of the SPAs, the defendant is liable to pay the plaintiff damages of 10% of the purchase price from the expiry of the 36 months of the respective date of the SPAs until basic infrastructure is completed.

C **[15]** The defendant's contractual obligation was to complete and ready the bungalow plots for the delivery of vacant possession to the plaintiffs respectively by the completion date which was not later than 36 months from the date of the respective SPAs. The plaintiffs were entitled to receive the delivery of vacant possession not later than 36 months from the date each D respective plaintiff executed the SPA with the defendant, subject to the plaintiff having paid the defendant the instalments to the stage of the completion of basic infrastructure works, which at the most meant that the plaintiff must have paid 36 instalments. Then, they would be entitled to receive the delivery of vacant possession. Each respective plaintiff was E obligated to pay the respective sums monthly on the seventh of every month as per Schedule 3 to the SPAs. In this case, all the plaintiffs had discharged their obligations and were entitled to receive the delivery of vacant possession by the 36th month from the date of execution of their SPAs respectively.

F **[16]** The defendant on its part had failed to deliver vacant possession of the bungalow plots to the respective plaintiffs. Evidence at trial also showed that they had failed to construct the basic infrastructure works as per the SPAs. On a balance of probabilities, the defendant had indeed breached its contractual obligations under the SPAs.

G **Clause 16(4) SPAs**

[17] Drafted as one of the issues to be tried is whether pursuant to cl. 16(4) of the SPAs, the defendant is liable to pay damages of 10% of the purchase price from the expiry of 36 months of the date of the SPAs until basic infrastructure is completed.

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[18] Interpreting the said clause and giving it its plain and ordinary meaning, the answer to this is in the affirmative but the rate to calculate the liquidated damages must be 8% as agreed to. As per the SPA, the liquidated damages the defendant must pay the plaintiffs would be calculated from 2002 I or 2003 wherever applicable to each of the plaintiffs depending on their respective execution of the SPAs. It is to be calculated day to day at 8% per annum on the respective purchase price until the date of full completion of the basic infrastructure of the respective bungalow plot in question.

[19] The second issue to be tried was whether the defendant's liability under cl. 16(4) of the SPAs was a continuous one. This court looked at the whole cl. 16 where cl. 16(1) provided that the plaintiffs were entitled to the delivery of vacant possession of their respective bungalow plots as they had paid the defendant all the instalments of 36 months. It follows that the event stipulated in cl. 16(4) applies here – the failure of delivery meant that the defendant had to pay liquidated damages at the rate agreed on. This liability for the damages is continuous until the date of the delivery of vacant possession of the respective bungalow plots to the plaintiffs which must have included the completion of the basic infrastructure works. The time period for the completion of the basic infrastructure works is also 36 months from the date of the respective contracts.

[20] However, the core issue of this suit is the bungalow plots that the plaintiffs had purchased. This other matter of non-payment of liquidated damages concerns a cause of action based on a breach of contract, specifically cl. 16(4) of the SPAs. The plaintiffs are legally allowed to initiate an action for that cause of action within 36 from the date of the breach. The date of the breach had accrued from 36 months from the date of the respective SPAs. The Court of Appeal in *Golden Approach Sdn Bhd v. Lau Sen Leong & Anor* [2019] 3 CLJ 755; [2019] 3 MLJ 777 held at p. 767 (CLJ); p. 791 (MLJ):

> Thirdly, the plaintiffs submitted that they would not be able to calculate liquidated damages if they proceeded in filing their claim at the time of breach on 4 August 1998. In other words, the contention of the plaintiffs is that the cause of action would not be complete until the property was actually completed and vacant possession given to the plaintiffs. However, we are of the view that it would not be correct to say that the cause of action would shift because they could not calculate liquidated damages if they were to file their claim at the time of breach, as there was no delivery at the time of the breach. The issue on hand is when the cause of action accrued. It ought not to be confused with the reliefs claimed.

[21] So, any claim for liquidated damages based on the breach of contract is time-barred. See *Loh Wai Lian v. SEA Housing Corp Sdn Bhd* [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223; [1984] 2 MLJ 280 and *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753; [1996] 2 MLJ 188. So, this court rejects the prayer that sought for payment from the defendants for the amounts exhibited in Schedule A to the plaintiffs' statement of claim. Although the words 'liquidated damages' were not used in prayer (g) in the statement of claim, the calculation tabulated was 8% per annum of the respective price multiplied by the number of days from the date vacant possession was to have been delivered to the date of the filing of this suit. That is exactly the formula stipulated in cl. 16(4) of the SPAs. Here, this court's decision will focus on the prayers sought by the plaintiffs which are for specific performance and declarations for the recovery of land, in addition to damages.

Individual Titles For The Bungalow Plots

[22] Another issue to be tried is whether the defendant was liable to apply for the individual titles for the plaintiffs' bungalow plots. Clause 2 of the SPAs stated that the defendant, at its own costs and expenses, was to obtain the necessary approvals and sub-division of the land from the appropriate authorities for the development of the project in accordance with the proposed sub-division plan annexed to the SPAs. Clause 11 specifically addresses the issue of separate document of title/transfer of title:

> (1) The Vendor shall, at its own cost and expense, use its best efforts to obtain expeditiously as possible the issue of the separate qualified document of title to the said Plot.
>
> (2) Upon the issuance of the said separate qualified document of title to the said Plot and subject to the full payment of the Purchase Price and any other monies due and owing by the Purchaser under this Agreement, by the Purchaser to the Vendor in accordance with the terms and conditions in this Agreement and the observance and performance of all the terms and conditions herein provided, the vendor shall within twenty-one (21) days, execute a memorandum of transfer of the said Plot to the Purchaser, his heir or permitted assign, as the case may be.
>
> (3) The Purchaser shall not and shall also procure that its Financier shall not pending the issuance of a separate qualified document of title to the said Plot lodge any caveat over the said Land or any part thereof at any time whatsoever. In the event such caveat is lodged over the said Land or any part thereof the Vendor shall be entitled to take the appropriate action to have the same cancelled or removed and the Purchaser shall bear all the costs and expenses incurred in respect thereof.

[23] Clearly, in the most certain way of construction, the defendant was contractually obligated to obtain the issuance of the separate qualified documents of titles of each of the bungalow plots. The defendant's obligation is to execute this as expeditiously as possible at its own costs and expenses. The answer to this issue to be tried is also in the affirmative. It is important to note that the SPAs between the parties are still subsisting and binding on each of them. Evidence at trial confirmed that the SPAs had not been terminated by any party at any time.

Limitation Act 1953

[24] The defendant's defence relied on s. 6(1) of the Limitation Act 1953 which claimed that the plaintiffs' claim was time-barred. The defendant through its pleadings, cross-examination of the plaintiffs' witnesses and submissions, implored this court that this action by the plaintiffs is time-barred. The SPAs were executed in 1999 with some of the plaintiffs and in 2000 with the rest, thus 36 months from those dates were 2002 and 2003.

This argument was based on the basis that the plaintiffs' action was on a breach of contract – cl. 16 of the SPAs. The defendant took the position that the cause of action began when delivery of vacant possession was due but did not – which would mean 2002 for some and 2003 for the others. The defendant contended that the six-year limitation was in 2008 for some and 2009 for the others.

[25] The defendant also submitted that even if the plaintiffs' cause of action was based on the last payment date made to the defendant, the plaintiffs were still out of time. The time limitation period according to the calculation by the defendant ranged between 2010 and 2016. The defendant sought for a dismissal of this suit which was filed in 2022.

[26] In considering this argument, this court collated the relevant dates as per the table below:

Plaintiff	Date of SPA	Delivery of V/Poss	Last payment
1 & 2 x 2*	20.2.2000	20.2.2003	28.2.2010
3 & 4	20.8.1999	20.8.2002	20.8.2007
5	22.6.1999	22.6.2002	17.6.2009
6	26.5.1999	26.5.2002	8.4.2009
7	20.2.2000	20.2.2003	19.2.2008
8	20.9.1999	20.9.2002	8.10.2007
9	20.3.2000	20.3.2003	21.3.2008
10	10.6.1999	10.6.2002	20.4.2009
11	20.3.1999	20.3.2002	21.4.2008
12 x 2*	20.4.1999	20.4.2002	8.10.2002
13	9.6.1999	9.6.2002	20.5.2008
14	9.7.1999	9.7.2002	4.5.2004
15	10.6.1999	10.6.2002	5.2.2004
16	20.2.2000	20.2.2003	10.12.2007
17 & 18	20.11.1999	20.11.2002	30.1.2004
19	29.4.2000	29.4.2003	23.8.2004
20	10.6.1999	10.6.2002	28.12.2002

Plaintiff	Date of SPA	Delivery of V/Poss	Last payment
21 x 2*	18.6.1999	18.6.2002	10.7.2002
22	20.10.1999	20.10.2002	20.2.2006
23	20.11.1999	20.11.2002	Nov 2009
24	20.3.2000	20.3.2003	20.7.2009
25	1.6.1999	1.6.2002	June 2003

* means the plaintiffs bought two bungalow plots

[27] The Federal Court case of *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 was referred to by the defendant in its submission that time ran out for the plaintiffs to mount this legal action against it. The decision at p. 23 was cited:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown*). In *Reeves v. Butcher* Lindley LJ said:
>
> > This expression 'cause of action' has been repeatedly the subject of decision and it has been held, particularly in *Henry v. Garland* decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it is has always been held that the statute runs from the earliest time at which an action could be brought.
>
> In *Board of Trade v. Cayzer, Irving & Co Viscount Dunedin* described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. In the case of actions founded on contract, therefore, time runs from breach (per Fields J in *Gibbs v. Guild*).

[28] The defendant argued that having only commenced the proceedings in 2020, the plaintiffs are 11 years out of time. The defendant submitted that should this court be persuaded to consider the dates of the last payments made by the plaintiffs, the limitation had also set in – in the range of 2008 and 2016.

[29] This court looked into the Federal Court case of *Nasri v. Mesah* (*supra*) which was an appeal based on a claim for the specific performance of an agreement dated in 1947 where payments were made for land but the respondent had failed or refused to transfer it to the appellant/purchaser. In allowing the said appeal, the Federal Court decided that, at p. 32:

> in this case whether the action was for specific performance of an agreement for the sale of land or for a declaration of title to land, it was essentially an action to recover land, and the period of limitation therefore would be twelve years;
>
> time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. A cause of action on a contract accrues on the date of breach and in the case of actions found on contract, therefore, the time runs from the breach.

[30] In that case, the facts differed from the present position of the plaintiffs here. In 1947, at the date of the agreement, the appellant there had received the issued document in respect of the title to the land but was promised an execution of a valid and registrable transfer of the land in his favour upon the moratorium at the time in place on the land was lifted. The appellant had even received the delivery of vacant possession and had lived on the land ever since. In 1967, when the suit for the execution of land transfer was commenced, the trial court dismissed it on the ground of limitation. At the appeal, the Federal Court found, at p. 33:

> In the present action the plaintiff's prayer was for an order that the defendant do execute a valid and registrable transfer of the land. In other words, he was asking for specific performance of the agreement as in *Ng Moh*'s case. But what in effect he was seeking to do was to obtain the land by a judgment of the court. It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 2 years in either case.

[31] The excerpt referred to by the defendant for the definition of cause action was not complete as in the same paragraph at p. 34, the very next line after the Federal Court held that the time starts to run from the breach for actions founded on contract, it held:

> In the case of actions founded on any other right, time runs from the date of which that right is infringed or there is a threat of its infringement (see *Bolo*'s case). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

When The Cause Of Action Accrues

[32] The Federal Court then, after having confirmed that the period of limitation was 12 years as it was in relation to an action for the recovery of land, it deliberated to answer the question as to when such period of limitation began to run. It was decided that the period of limitation had begun to run only from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land. In that case, it was neither pleaded in the

A statement of claim nor defence, the date when there was there was a clear and unequivocal refusal by the defendant to sign the transfer. There was no evidence led at trial either as the trial judge had taken the approach to settle the point of law on the limitation period, and as parties had agreed not to call any evidence but the defendant would consent to the judgment should
B the limitation question was answered in the plaintiff's favour, he had accepted the statement of claim as being correct. What was pleaded was the plaintiff's letter of 1966 to the defendant inquiring as to the status of the transfer; as that was all the Federal Court had on facts which it noted that there could have been an argument that the action was premature but that was
C not the position taken by the defendant who had relied on the limitation period. So, the Federal Court held at p. 35:

> In any event, service of the writ on the defendant constituted notice of the appellant's intention to stand on his legal right under the agreement (see *Tool Metal Co v. Tungsten Electric Co*) and there was no threat to
D infringe that right until the defence was filed. Whatever view I take of the case, it would seem clear that time did not begin to run against the plaintiff until shortly before the action was filed. It was therefore not barred by limitation.

[33] This court examined the pleadings and the plaintiffs' claim and found
E that the plaintiffs' prayers as stipulated above were actually an action for the recovery of land – they sought this court to declare their beneficial interest in the bungalow plots and that the defendant was a trustee to them. They sought for the delivery of vacant possession and the surrender of their land titles. Those are all for the recovery of land – the bungalow lots that they had agreed to purchase and for some of them had in every sense of the SPAs
F purchased the land by making full payment. They additionally sought for liquidated damages as per the SPAs, together with damages for unjust enrichment as the defendant had collected payments from the plaintiffs but did not develop the land but instead planted oil palm trees and benefitted therefrom. This court finds that this was not a case where the claim was just
G on the demand of liquidated damages which were unpaid, and which thereby breached the SPAs. The plaintiffs are rightly asking for the delivery of vacant possession and the issuance of titles of their bungalow plots. This court referred to the Court of Appeal decision in the case of *Economic Development (Low Cost Houses) Sdn Bhd v. Majlis Perbandaran Seberang Perai* [2012] 9 CLJ
H 158:

> We are of the view that the plaintiff's OS is an action for recovery of land. Section 9(1) of the Limitation Act 1953 provides that the limitation period for an action for recovery of land shall be 12 years. (A reference hereinafter to a section is a reference to that section in the Limitation Act 1953).

I

> … The judgment of the Federal Court delivered by Gill FJ (later CJ (M)) in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 FC at p. 33 H-I rt column made it clear that whether the action is for specific performance or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

[34] The action before this court is an action for the recovery of land. As such, the plaintiffs' claims fall within s. 9(1) of the Limitation Act 1953. Hence, the limitation period for this action is 12 years. The cases that the defendant had referred this court to in its arguments related to cases of breaches of contracts proper which are inapplicable here as this suit is in essence is for the recovery of land. The authorities, however, would be applicable in addressing the issue of liquidated damages which is also addressed in this judgment.

[35] This court examined the facts of the case to ascertain the date when the cause of action accrues to determine whether the defendant's defence of time-barred can be sustained. The first 11 plaintiffs had paid the full purchase price. The defendant received and accepted the payments without protest or conditions. In fact, official receipts were issued by the defendant even way after the deadline of when it was obligated to deliver vacant possession of the respective bungalow plots. The defendant had also issued statements that confirmed all the payments made by the plaintiffs. The remaining 14 bungalow plots. Evidence adduced at trial showed that the defendant had even consented to this. Further, this court considered the evidence of the plaintiffs' actions and conduct, together with the defendant's to determine when the cause of action began to accrue. The date can then determine whether limitation sets in as per the defendant's contention.

[36] During cross-examination, the first plaintiff (who had also testified for the second plaintiff) of 62 years, testified that he was at sea so after the date of delivery for vacant possession which fell on 20 February 2003, he was not able to initiate any legal action. Despite him being away, he had already arranged for the instalments payments to proceed automatically monthly. For the bungalow plot that the first and second plaintiffs purchased, payment had been paid in full as of 28 February 2010 *vide* auto monthly payment as per the evidence (P7 and P8 issued by an acknowledgment of the defendants). PW1 clarified that when he came onshore and home from sailing in 2003, he visited the site and found that there was a clubhouse built which was used as the defendant's office but no other infrastructure built there on the land. When he asked the defendant about his bungalow plot, the defendant had answered that there were some delays. He went back to sea and five years later, upon his visit to the defendant, he was informed to continue with the payments. In 2010 upon the completion of the payment, yet still, no development of the project, what more delivery of vacant possession, the first plaintiff tried to seek legal counsel in Malacca. According to his testimony, no lawyers in Malacca would take up the case with the reason that the

A defendant was too powerful in the community but he found a counsel based in Kuala Lumpur who was willing to take up the case. Upon being ground back to shore, on the basis that he had felt cheated and proceeded to instruct the counsel to issue the notice of 13 March 2020. The defendant had refused and/or failed to respond so a letter of demand was issued on 4 June 2020. B Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020.

[37] The writ and statement of claim were personally served on the defendant on 7 August 2020. A copy was also served on the defendant by way of registered post and the acknowledgment of receipt was dated C 12 August 2020. Nevertheless, the defendant had failed to enter an appearance to this legal suit and a certificate of non-appearance was filed by the plaintiffs on 4 September 2020. A judgment in default against the defendant was granted by this court on 7 September 2020. Then on 7 October 2020, the defendant had applied for leave to file its defence and set aside the D judgment in default. The defendant's application was allowed on 14 December 2020. The defence was filed on 28 December 2020. There was no evidence that the defendant had responded to the first and second plaintiffs until its application for leave to enter an appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

E **[38]** The third plaintiff (who also testified for the fourth plaintiff, his father of 72 years of age) had also paid the full purchase price – the instalment payment proceeded even after the defendant had not delivered vacant possession. All the payments were duly accepted by the defendant – official receipts issued (P13). Then a year after the full payment was completed, the F third and fourth plaintiffs instructed legal counsel to issue a notice of demand for the payment of liquidated damages until the date of the delivery of vacant possession (P14). It was dated 27 February 2008 and having received no response from the defendant, the next notice was undertaken on 13 March 2020 followed by a letter of demand of 4 June 2020, both of which had not G been responded to by the defendant, and the filing of this suit. Throughout there was no evidence of the defendant responding to the third and fourth plaintiffs until its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[39] The fifth plaintiff, a 67-year-old homemaker, after having paid in full H the purchase price for her bungalow lot on 17 June 2009 had not received the delivery of its vacant possession. The defendant had accepted the payments – official statements (P17). So, she had written a letter dated 20 December 2012 (P18) seeking a refund of the purchase price together with interest. What was stated also some few occasions where the defendant was I engaged and had informed that it "would be seeing the light at the end of the tunnel soon". On the letter, P18 were notations that stated the defendant's information on the progress of the project, all of which there was hope for

a solution by the middle of 2014. The last was on 13 July 2016. The official response from the defendant to the fifth plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[40] The sixth plaintiff, a 71-year-old retiree, had settled the full purchase price with her last instalment on 8 April 2009. The defendant accepted all payments – official receipts and statements were issued (P24 and P25). This was the position even long after the delivery of vacant possession was to be executed by the defendant on 26 May 2002. The sixth plaintiff testified repeatedly that the contract SPAs were not terminated. The recourse the sixth plaintiff took was to issue the notice on 13 March 2020 followed by a letter of demand on 4 June 2020, both of which the defendant failed to respond to. Even with the filing of this suit. Throughout, there was no evidence of the defendant responding to the sixth plaintiff until its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[41] The seventh plaintiff, 60 years of age, had also paid the purchase price in full as at 18 February 2008. There was no delivery of vacant possession by the defendant when it was due on 20 February 2003 but the seventh plaintiff had continued with his monthly instalments towards the full payment of the purchase price until 2008. He had filed this suit for the recovery of the land as well as liquidated damages. This was done *vide* the notice of 13 March 2020. The defendant had refused and or failed to respond so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the seventh plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[42] The eighth plaintiff, a 72-year-old retiree, who had bought the bungalow lot for her retirement had paid for it in full. The defendant received the last instalment on 8 October 2007 (P81 and P82 are the official receipts and statements) even when it did not deliver vacant possession of the bungalow plot to the eighth plaintiff. In her cross-examination, she testified that there were telephone calls she made to the defendant but had numerously received excuses. She even attended a meeting by the defendant in Ampang in 2008 thereabouts but the defendant did not confirm any resolution for the delivery of vacant possession of her bungalow plot. The eighth plaintiff then issued the notice of 13 March 2020. The defendant had refused and or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the eighth plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[43] The ninth plaintiff, a 65-year-old retiree, paid his final instalment for the full purchase price for his bungalow lot on 21 March 2008. The defendant had received all payments from him without any conditions as evidenced by the official receipts (P29). Before he completed the full and final settlement for the payment of his bungalow lot, he wrote to the defendant on 8 June 2003 (P30) as he had not received the delivery of vacant possession three months earlier on 20 March 2003. He had also stated that there was no sign of site construction activity. He notified the defendant that he would temporarily stop the auto-payment for the monthly instalment until the construction works resumed. The defendant wrote to the ninth plaintiff informing him that the defendant had asked MBSB and MBSB Developments Sdn Bhd to complete the development and thanked the ninth plaintiff for his patience and promised to revert to the ninth plaintiff on the latest development soonest. Upon this representation and undertaking, the ninth plaintiff resumed his auto-payment for the monthly instalments. The ninth plaintiff then issued the notice of 13 March 2020. The defendant had refused and/or failed to respond so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond, to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the ninth plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[44] The tenth plaintiff, a 55-year-old who bought the bungalow lot for investment, had settled the full purchase price as of 20 April 2009. Even though the defendant did not deliver the vacant possession of his bungalow plot on 10 June 2002, it continued to receive all of the tenth plaintiff's payments (P48). He had testified he had looked into other alternatives to recover his bungalow lot from the defendant but had finally resorted to the issuance of the notice of 13 March 2020. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the tenth plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[45] The 11th plaintiff, a 63-year-old manager testified all the way from India *via* the Zoom platform. He too had paid the full purchase price. The defendant had received the final instalment on 21 April 2008 (P111). In cross-examination, the 11th plaintiff informed this court that there were attempts by the group of plaintiffs to reach out to the defendant but was unable to contact it. So, the 11th plaintiff had then issued the notice of 13 March 2020. The defendant had refused and/or failed to respond so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The

official response from the defendant to the 11th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[46] The 12th plaintiff, a 60-year-old business persuaded by the representations and advertisement by the defendant, bought two bungalow lots of which delivery of its vacant possession respectively was to be executed on 20 April 2002. He had continued to pay monthly instalments until 8 August 2002 for the first bungalow plot (P85 and P87), and until 1 December 2022 for the second bungalow plot (P86 and P88) – all of which the defendant acknowledged and accepted. The 12th plaintiff testified that when the defendant failed to deliver the vacant possession of the land, he had inspected the site for the project and found that nothing was done and it had remained an oil palm plantation. When he had checked on this matter with the defendant, it had directed him to MBSB's office. The 12th plaintiff went to MBSB's office who had told him to go to the defendant for answers. This continued for a few trips where the defendant had informed him to stop paying the instalment for a while until things were resolved.

[47] It was the evidence of the 12th plaintiff that in 2004 when things did not progress, they met up with the MCA Public Services and Complaints Department and the National Housebuyers Association. There was an attempt to meet the Pengerusi Jawatankuasa Negeri, Perumahan Kerajaan Tempatan, Jabatan Ketua Menteri Melaka, but failed to obtain a response. He then subsequently discovered in 2007 that there was a suit between the defendant and MBSB. In 2009 together with other plaintiffs, the 12th plaintiff wrote to MBSB to meet which the latter agreed to on 2 April 2009. The 12th plaintiff had tried to contact the defendant but it had moved with no new correspondence address.

[48] There was also a meeting held with Biro Pengaduan Awam Jabatan Perdana Menteri on 4 May 2009 which was informed *vide* a letter of 30 April 2009 (P89). It was at this meeting that the plaintiffs discovered the said legal suit between the defendant and MBSB (P91). Pursuant to the meeting, the defendant was to issue a list of the purchasers but had failed to do so. Other efforts confirmed by the 12th plaintiff was a memorandum dated 3 August 2009 to Bank Negara Malaysia that forwarded the complaint about the defendant's failure to develop the project and deliver vacant possession to the plaintiffs (P89). According to the 12th plaintiff, the land office issued a notice against the defendant for failure to pay quit rent which, in 2015, it was discovered that it had settled the quit rent. The 12th plaintiff had even lodged police reports (P92) on 25 July 2009 and 6 August 2009 on this incident claiming that he was cheated by the defendant.

[49] There were no responses whatsoever by the defendant on the issue of the delivery of vacant possession to the 12th plaintiff. At the end of the day, the 12th plaintiff resorted to the issuance of the notice of 13 March 2020.

The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 12th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[50] The thirteenth plaintiff, a 69-year-old retiree, was to receive the delivery of vacant possession on 9 June 2008 but the defendant had failed to deliver. The defendant continued to receive and accept the monthly instalment payments towards the purchase price of the bungalow plot from the 13th plaintiff until 20 May 2008 (P44, P45 and P46). She had testified that she had stopped the instalment payments in 2008 because together with some of the other plaintiffs she had inquired at the defendant's office on the status of the project. The defendant had informed that there was a court case with MBSB and the project was stalled but had still demanded for the payment of the full purchase price. One of the defendant's staff had then advised her to stop paying them which she did. There were no other responses from the defendant. So, the 13th plaintiff then issued the notice of 13 March 2020. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 13th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[51] The 14th plaintiff, another retiree who is 71 years of age, bought the bungalow plot for his retirement. The defendant did not deliver vacant possession on 9 July 2002 but continued to accept the payments (P50). Then on 4 May 2004, the 14th plaintiff decided to stop the instalment payment pending the delivery of vacant possession. No response from the defendant. An issuance of the notice of 13 March 2020 was made. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 14th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[52] The 15th plaintiff, a 64-year-old life insurance agent had also stopped her monthly instalment payment on 5 February 2004. Although the defendant had failed to deliver vacant possession of her bungalow lot on 10 June 2002, it continued to accept the payments (P35, P36 and P37). The 15th plaintiff had lodged a police report on 5 May 2010 (P38). Then she issued the notice of 13 March 2020. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the

defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 15th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[53] The 16th plaintiff, a 63-year-old retiree, bought the bungalow lot for residence after his retirement. The defendant had failed to deliver vacant possession of the bungalow plot on 20 February 2003 but continued to accept the monthly instalments paid by the 16th plaintiff until 10 December 2007 (P95 and P96). The 16th plaintiff went to the project site and discovered nothing had been done to the land to develop the project. Then she inquired at the defendant's office. She did not receive any satisfactory answer for the delivery of vacant possession of the bungalow plot. The visit to the conveyancing lawyer was not successful as she was not allowed into their office and had refused to take her calls. There were no delivery of vacant possession nor a refund of the purchase price paid so she issued the notice of 13 March 2020. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 16th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[54] The seventeenth plaintiff, a 72-year-old retiree (on 20 November 2002 but the defendant continued to accept their payments until 30 January 2004 ((P58 and P59 who also testified for his wife the 16th plaintiff), also did not receive the delivery of vacant possession). They had stopped the monthly instalments as there was no information about the progress of the project after the date they were to receive delivery of vacant possession. They wrote several letters to the defendant; the first was on 3 January 2004 asking for an update (P61) to which the defendant had replied that they had asked MBSB to hand over the developed land to the purchasers (P62). Then, on 6 February 2004, notifying the defendant that they would stall their monthly instalment payment (P63). Again, on 19 April 2006 where they sought confirmation on the status; they had also copied MBSB on the letter. MBSB had responded and denied any involvement in the project (P65). The defendant had not responded. Not even to the notice of 13 March 2020. So, a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 17th and 18th plaintiffs came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained. The evidence shows that the 17th and 18th plaintiffs were of the understanding that at the time they had stopped their monthly instalments, the liquidated damages owed to them by the defendant was more in terms of amount.

[55] The 19th plaintiff, another retiree who was 69 years of age, bought the bungalow for his retirement home. The defendant had failed to deliver vacant possession on 20 November 2002 but had accepted the monthly instalments until 23 August 2004 (P77 and P78). He testified that after 50 instalments, when the vacant possession was not delivered, he had stopped the monthly instalments. The 19th plaintiff had lodged a police report on 5 August 2009. There was no feedback from the defendant. Even to the issuance of the notice of 13 March 2020. The defendant had also refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. So, this suit was filed on 5 August 2020. The official response from the defendant to the 19th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained. The 19th plaintiff testified that due to the legal dispute with MBSB, the defendant had extended the period for resolution until 2016.

[56] The 20th plaintiff is a 53-year-old accountant who knew of the project through her friend, the 15th plaintiff. She bought it for investment purposes and was to receive the delivery of vacant possession on 10 June 2002. However, the defendant had failed to do so. It did continue to accept the monthly instalment payments made by the 20th plaintiff until 28 December 2002 (P108). She had stopped the monthly instalment payments because there was no progress in the development of the project by the defendant. She had felt she was cheated after the last monthly instalment, so she had called the defendant to seek for the delivery of vacant possession of her bungalow plot. The defendant had not responded except to state that it would update after a few months. Later, the telephone calls did not get through to the defendant. The 20th plaintiff then lodged a police report on 7 May 2010 (P110). The 20th plaintiff then issued the notice of 13 March 2020. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 20th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[57] The 21st plaintiff, a 64-year-old businessman, bought two bungalow plots for his residence. The defendant had failed to deliver vacant possession on 18 June 2002. He had stopped his monthly instalment payment on 10 July 2002 (P55 and P56) because he lived near the land and had realised that the defendant had not started any work on the land to develop the project. The defendant had not updated the 21st plaintiff at all on the status of the project. He issued the notice of 13 March 2020. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 21st plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[58] The 22nd plaintiff, a 66-year-old homemaker, bought a bungalow plot and was to receive the delivery of vacant possession on 20 October 2002. The defendant had failed to execute such although it continued to accept monthly instalment payments until 22 February 2006 (P67, P68 and P69). The 22nd plaintiff wrote to the defendant on 6 November 2003 and expressed her concern that she was not informed by the defendant that there were disruptions on the access road work and sought for the defendant to inform her soonest possible (P70). The defendant replied on 7 November 2003 that stated it was asking MBSB to complete the development of the project and would revert to the 22nd plaintiff on the latest development soonest (P71). The 22nd plaintiff then issued another letter *vide* its lawyers on 9 September 2005 to inquire on the most recent development and at the same time had also sought for a temporary suspension of the monthly instalment payment (P72). On 13 March 2006, she wrote to the defendant which stated that the defendant had failed to provide the relevant information sought together with the delivery of vacant possession, and so she will not continue with the monthly instalment payments until the defendant had furnished information on the bungalow plots (P73). As age was catching up on her, she then issued the notice of 13 March 2020. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 22nd plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[59] The 23rd plaintiff, a 49-year-old friend of one of the executive Directors of the defendant, had bought a bungalow plot which vacant possession was to be delivered on 20 November 2002. The defendant had failed to do so but had accepted payments for the monthly instalment until November 2009 (P103 and P104). On 15 October 2003, he wrote to the defendant to inquire about the status of his bungalow plot and asked for a temporary freeze on the monthly instalment (P105) due to the defendant's failure to deliver vacant possession because the basic infrastructure work was not completed. His letter was copied to MBSB. The defendant did not answer to the 23rd plaintiff's request. He then issued the notice of 13 March 2020. The defendant had also refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 23rd plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[60] The 24th plaintiff, another homemaker 63 years of age, had not received delivery of vacant possession of her bungalow lot by the defendant on 20 March 2009. However, it continued accepting her monthly instalment payments until 20 July 2009 (P40 and P41). She had stopped as even until then she had not received the delivery of vacant possession and the defendant had not updated her on anything at all. She then issued the notice of 13 March 2020. The defendant had refused and/or failed to respond, so a letter of demand was issued on 4 June 2020. Again, the defendant had failed to respond to the demand and this suit was filed on 5 August 2020. The official response from the defendant to the 24th plaintiff came in the form of its application for leave to enter appearance, file in defence and set aside the judgment in default that the plaintiffs had obtained.

[61] The 25th plaintiff, 52 years old, had not received the delivery of vacant possession from the defendant on 1 June 2002. However, she had continued to pay and the defendant had continued to accept her monthly instalment payments in June 2003 (P98). She testified that the defendant had sent her a reminder for the payment on 4 September 2003 (P99). The 25th plaintiff had called the defendant who had accepted that the payments were on hold until further notice from the defendant. The defendant issued a letter dated 14 July 2003 that it would revert to her (P101) but did not. There were emails from the 25th plaintiff requesting for updates – on 8 March 2019, 9 March 2019 and 4 August 2019. It seemed that she had also visited the defendant in 2018 but had not obtained any response from the defendant.

[62] The defendant's director testified and had confirmed that to finance its purchase of the land, it had obtained a loan from MBSB and the land was encumbered in favour of MBSB. This was in 1997. It was confirmed in evidence that there were interests mounting on the loan given to the defendant in 1997. Nonetheless, in 1999, the defendant had launched the project. The bungalow plots were sold to the plaintiffs. According to her, MBSB was to develop the land as it was the requirement of the loan from MBSB but they did not. This court noted that the defendant could have brought MBSB or MBSB Development Sdn Bhd to this suit but did not do so. MBSB had already disbursed RM8,000,000 to the defendant before the project was launched and the SPAs were executed.

[63] It was the testimony of the defendant's director that the defendant was unable to fund the project on their own and could not start the project because MBSB did not disburse the RM13,000,000 bridging/balance loan. She confirmed that the project had failed and was abandoned in 2003. She had blamed the failure on the problems with MBSB which withdrew the bridging loan, and that the defendant was involved in numerous legal suits (with MBSB and its subsidiaries and also the purchasers of the project). She had confirmed that with regard to the legal suit with MBSB, the defendant had entered a settlement agreement. The land is now the defendant's free from encumbrances.

[64] The defendant did not inform any of the plaintiffs that the project was abandoned in 2003. The defendant claimed that they needed MBSB's consent to notify the plaintiffs which was a term of the purported joint venture agreement between them, but the said agreement was not produced in this court.

[65] It was her testimony that prior to this, the plaintiffs had not initiated any action for the recovery of the land, nor the return of the purchase price. She had additionally testified that the land in its original state was an oil palm plantation and no profits were derived from it. She informed the court that the defendant had every intention to develop the project as can be seen through the minutes of meetings with MBSB and the relevant parties. The defendant claimed that the money that the plaintiffs had paid went back into the project but there was no proof of such. The defendant's director testified that they did not respond to any notice or demand by the plaintiffs because the project had failed in 2003.

[66] In determining when the cause of action arose to calculate the limitation period of 12 years, this court scrutinised the evidence to conclude when the first clear and unequivocal threat to the plaintiffs' rights to the vacant possession of the land and the transfer of land title to them. In 2001, the defendant had full knowledge of the enormous problem in terms of finances which was not forthcoming from MBSB – the defendant's letter dated 28 December 2001 (D117) plainly iterated the situation that included its obligation to deliver vacant possession to the plaintiffs. The defendant's letter of 3 January 2002 (D118) that followed also confirmed that the defendant was aware that the delivery of vacant possession would not have been possible as it was contractually obligated to deliver vacant possession to the 11th plaintiff the very next month. Yet, when the dates were due, there was not a single explanation from the defendant to any of the plaintiffs. So, this court finds that to the plaintiffs there were no clear and unequivocal refusal to deliver vacant possession of the respective bungalow plots to the plaintiffs.

[67] The other evidence that proved on a balance of probabilities that the defendant showed, represented, conveyed by words and/or conduct to the plaintiffs that they had yet to clearly and unequivocally refuse to deliver the vacant possession of the respective bungalow plots to the plaintiffs include:

(i) when the first plaintiff came back from sea and was grounded for a few months in 2003, he was informed by the defendant that there were some delays in the development of the project;

(ii) the defendant had not bothered to respond to the letters of demand issued by the third and fourth plaintiffs;

(iii) the defendant informed the fifth plaintiff (and her husband) numerous times that they 'would see the light at the end of the tunnel soon';

(iv) provided excuses and unsatisfactory responses to the eighth, 11th, 12th, 16th and 20th plaintiffs and had not answered their numerous calls;

(v) the defendant thanked the ninth plaintiff for his patience and had promised to revert but did not when he informed the defendant that he would stall the monthly payments until construction commenced;

(vi) the defendant informed the 13th plaintiff that the project was stalled;

(vii) the defendant did not respond to the 14th, 19th, 22nd and 23rd plaintiffs upon the halt of the monthly instalment payments;

(viii) the defendant had sent the 12th plaintiff on a wild goose chase when it asked him to inquire from MBSB in 2002;

(ix) the defendant had assured the 20th plaintiff after 2002 that it would update but had failed to do so;

(x) the defendant informed the 23rd plaintiff on 7 November 2003 that it had asked MBSB to complete the development of the project.

[68] In fact, the defendant had proceeded to continue to accept the monthly instalment payments from the plaintiffs even way past 2003 when the project was abandoned. In that year itself, it even sent a reminder to the 25th plaintiff for the monthly instalment payments due. The defendant had continued to accept the monthly instalment payments from the plaintiffs way after the date of the delivery of vacant possession and also a considerable time after 2003 when the project was abandoned, confirmed by the defendant. The acceptance was unconditional. The issuance of the voluminous official receipts and statements cannot be construed that the defendant had clearly and unequivocally refused or threatened to infringe the plaintiffs' rights for vacant possession of the land. It may be debatable that the non-responses to the notice dated 13 March 2020 and the demand of 4 June 2020 could be construed as a refusal that threatened the plaintiffs' rights to the vacant possession of the respective bungalow plots.

[69] The only time the defendant had clearly denied and refuted the plaintiffs' claim was on 7 October 2020 when it filed an application to this court for leave to enter appearance and file defence. It is the conclusion of this court that the cause of action would only arise then. The plaintiffs' claim for the recovery of land is therefore not time-barred.

[70] It is worth a mention here that the plaintiffs, in this case, do not fall within the classic scenario of sleeping on their rights which is one of the purposes of the doctrine of limitation. Throughout the years, 11 of the plaintiffs fulfilled the obligations and paid the purchase price in full of the respective bungalow lot they each had entered the SPA into with the defendant. The others had stopped their monthly instalment payments although a substantial portion of the purchase price had been paid upon visits

to the land and having witnessed no construction had commenced to develop the project. All of them had sought one way or the other responses and resolutions from the defendant. At the same time, this also was not a situation where the defendant was put into that position of uncertainty of legal actions as they were aware at all material times of their obligations to the plaintiffs who had sought for their rights through all this time. This is also one of the purposes of the doctrine of limitation – to ensure one should not be at risk of a stale claim. See *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409 and *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56; [1983] 1 MLJ 1. In this instance, this court will not allow a party to conduct itself in ignoring and being unresponsive and taking advantage of time passing to rely on the defence of limitation.

Trust Of The Bungalow Plots

[71] This court considered the plaintiffs' submissions that they have beneficial ownerships of their respective bungalow plots as the SPAs had been duly executed and payments were made towards the full purchase price. The Federal Court's decision of *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271; [2020] 4 MLJ 662 was relied on.

[72] The defendant argued that the SPAs that created a contractual relationship between the parties did not amount to a trustee and beneficial relationship. The Federal Court's decisions in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (Formerly Known As Time Engineering Sdn Bhd)* [1996] 2 CLJ 561; [1996] 2 MLJ 12 and *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; [2016] 3 MLJ 23 were referred to in its quarrel that beneficial ownership only applies to the plaintiffs who had paid the full purchase price.

[73] It is the decision of the Federal Court in *Borneo Housing Mortgage Finance Bhd* (*supra*) whilst confirming the position that a bare trustee is not created of the vendor to the purchaser at the time of the execution of the contract, that when the purchase price is fully paid by the plaintiffs and received by the defendant, the capacity changed – at p. 581 (CLJ); p. 29 (MLJ):

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of the sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then the vendor divests himself of his interest in the land.

[74] There were never any disputes that the plaintiffs had executed SPAs for the bungalow plots. All payments had been duly received by the defendant of which it had confirmed *vide* the issuance of the voluminous official receipts and statements. At trial, the essence of the cross-examination was that the claims of the plaintiffs were all out of time. Therefore, for the 11 plaintiffs who had paid in full, the defendant is the bare trustee of the bungalow plots for the respective 11 plaintiffs. Staring at paras. 30 and 31 of *He-Con Sdn Bhd* (*supra*) it was held:

> The nature and extent of that power, as will be seen later in this judgment, is limited and above all else, it cannot be exercised in a manner that will inconvenience the beneficial owner, who has admittedly paid the full purchase price. Also, as will be seen later, in the course of this judgment, a decision of high authority had ruled that a vendor of a property who has become a bare trustee cannot even lodge a caveat over the property for which its full purchase price he had received from the purchaser.
>
> The significance of these evidence is related to the issue of whether the deceased had indeed made full payment to the first defendant for the property. That fact would, if established, acc.

[75] Premised on the evidence that the first to the 11th plaintiffs had duly paid the purchase price of their respective bungalow lots in full and that the defendant had accepted it unconditionally as proven by the voluminous official receipts and statements issued, this court finds that the defendant is a bare trustee of the respective bungalow lots to them. There, the question of time-barred/limitation period does not arise here. The defendant as a bare trustee, cannot in law pass any interest in the property or deal with the bungalow plots of the first to the 11th plaintiffs. See *He-Con Sdn Bhd* (*supra*).

[76] The defendant's contention that the existence of a trust may exist for the first to the 11th plaintiffs who had paid in full, but again, their action for declaration was time-barred was considered and rejected.

[77] For the 12th to the 25th plaintiffs, it was submitted that the amount of liquidated damages owed by the defendant to them far surpassed the small balance of amount left as they had paid a substantial amount of the purchase price of their respective bungalow plots. They too claim that the defendant was also their bare trustee. They had relied on authorities that allowed a set-off of the balance of the purchase price owed by the plaintiffs from the liquidated damages were referred to – *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305; [1982] 1 MLRA 148, *Kumaraguru Thandavathevar v. Ooi Soo Teik & Anor* [2017] 10 CLJ 129; [2018] 8 MLJ 82, *Neoh Khoon Lye v. Trans-Intan Sdn Bhd* [2002] 7 CLJ 420; [2002] 2 MLRH 493 and *BJ Homes Development Sdn Bhd lwn. Lim Lay Imm* [2021] 1 LNS 1699; [2021] MLRHU 557.

[78] This court cannot accept that position as the facts in the cases cited had brought the action for liquidated damages within six years of the breaches of contracts. They were pursued during the six-year period according to the Limitation Act 1953 from when the cause of action had arisen – the date of the breach of contract to deliver vacant possession of the properties. That is not the case here. The cause of action is premised on the recovery of land. For liquidated damages as ruled by this court above, the action for that remedy due to the breach of contract is out of time. The cause of action had accrued from 2002 and 2003 when the defendant had failed to deliver vacant possession of the land as contracted.

[79] The Federal Court case cited by the defendant in response to the plaintiffs' submission was *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; [2016] 2 MLJ 23 that held at pp. 205 to 206 (CLJ); p. 36 (MLJ):

> The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be the registered as the proprietor of the property.
>
> Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right *in rem* over the property. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC.
>
> On the other hand, a purchaser who has not settled the full price does not enjoy such benefit. The right of such purchaser is contractual in nature and *in personam*. The right of such purchaser is contractual in nature and *in personam*. He or she does not have any beneficial interest in the property. In the event of dispute, such purchaser can only institute action against the vendor with whom he or she has contracted. In other words, such purchaser merely enjoys a contractual right or a right *in personam*.
>
> In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against he world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.

[80] The Federal Court concluded at p. 209 (CLJ); p. 39 (MLJ) that the purchaser's right solely lies in the contract against the vendor and no cause of action could lie against the *bona fide* new purchaser of the property. At p. 209 (CLJ); p. 39 (MLJ) of the judgment, the following was meted:

A On the facts of the present case, it is our finding that the plaintiff is not vested with the beneficial interest in the property as he had not paid the full purchase price of the property. The plaintiff's right in the circumstances is purely contractual in nature as against the second defendant.

[81] Unfortunately, the 12th to the 25th plaintiffs here are not entitled to
B the declaration that they are beneficial owners of the bungalow plots which they had not yet paid in full. However, in all fairness, this court is of the considered view that the 12th to the 25th plaintiffs have some equitable rights to their respective bungalow plots. This is premised on the evidence which includes the conduct of the defendant in its acquiescence of the plaintiffs to
C stall their payments until further notice.

[82] As the evidence shows, the 12th plaintiff, for example, had paid the required monthly instalments even after the date when the defendant should have delivered vacant possession but did not. The defendant had informed the 12th plaintiff to stall the monthly payments until things were resolved.
D That was what the defendant had also advised the 13th and 25th plaintiffs. The 14th plaintiff had sought for consent to stall the rest of the monthly instalment payments until the vacant possession was delivered but the defendant had failed to respond nor did they complain on the suspension. The defendant had undertaken to update the latest development on the status
E of the project to the 20th, 21st, 22nd, 23rd, 24th and 25th plaintiffs but had failed to do so. The defendant had refused to answer the telephone calls from the 12th, 16th and the 23rd plaintiffs. The 12th to the 25th plaintiffs had paid a substantial amount and were nearing completion to the full purchase price.

[83] Evident too was the fact that the SPAs were not terminated by any
F party. It can be concluded that the plaintiffs had not terminated the SPAs even though the vacant possessions of their respective bungalow plots were not delivered. Also, the defendant had not terminated the SPAs because the project was abandoned and definitely not on the basis that some payments were stalled by the 12th to the 25th plaintiffs which were done with the
G consent and knowledge of the defendant. Therefore, this court opines that they acquired right *ad rem* which may warrant decree specific performance by the defendant pertaining to their respective bungalow plots.

[84] This court is of the considered view that the 12th to 25th plaintiffs had acquired a right to the respective bungalow plots against the defendant,
H though not to the world at large until it becomes a legal right upon the individual titles and transfer to them. The distinction of the right *ad rem* was made applied by the Federal Court in *S & M Jewellery Trading Sdn Bhd & Ors v. Fui Lian-Kwong Hing Sdn Bhd* [2015] 8 CLJ 16; [2015] 5 MLJ 717 at p. 34 (CLJ); p. 735 (MLJ):

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To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a 21 whole on registration in accordance with the Land Code.

Fraudulent Breach Of Trust

[85] For this issue, this court looked at the pleaded particulars in the plaintiffs' claim that stated:

(i) the defendant had allowed the plaintiffs to execute the SPAs without the intention to develop the land and to complete the project;

(ii) the defendant had refused and/or failed to deliver the vacant possession of the respective bungalow plots to the plaintiffs;

(iii) the defendant had refused and/or failed to develop the land to ensure the delivery of vacant possession of the respective bungalow plots to the plaintiffs;

(iv) the defendant had refused and/or failed to return the purchase paid by the plaintiffs when the project was not developed; and

(v) the defendant planted oil palm trees on the land and reaped profits therefrom without the consent and/or knowledge of the plaintiffs.

[86] For the purposes of this judgment, it is useful to replicate paras. 146 to 148 of the Federal Court's decision in *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1:

[146] In a gist, a new test was introduced by *Twinsectra*, in that the concept of subjective dishonesty became a requirement in a breach of trust situation. Lord Hoffman at p. 382 in this case opined:

> I do not think that it is fairly open to your Lordships to take this view of the law without departing from the principles laid down by the Privy Council in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378. For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behavior. I also agree with Lord Hutton that the judge correctly applied this test and that the Court of Appeal was not entitled, on the basis of the written transcript, to make a finding of dishonesty which the judge who saw and heard Mr Leach did not.

[147] Lord Hutton at p. 384 had added:

> Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'.

[87] By relying on the above test and upon the assessment of the evidence adduced at trial, this court finds that there was evidence that showed the defendant's effort to start developing the project. Meetings were held in 2001 for the planning to clear the land and the layout for basic infrastructure works. Thus, it is not accurate that the defendant did not have the intention to develop the land. There were pieces of evidence that showed that they may face financial constraints with some halts of the disbursement of the bridging loan from MBSB, but at best, the evidence only showed that the defendant has not may been so prudent and far sighted but did not crossover to fraud.

[88] As to the delivery of vacant possession of the respective bungalow plots to the plaintiffs and the development of land to ensure such delivery – these were undisputed facts. The defendant claimed they did not have money/capital to proceed with the works that would ensure the delivery of vacant possession, yet they continued to accept payments from the plaintiffs. Aside from oral claims, there was no other evidence to show that they were so strapped that they could not discharge their obligations. There was evidence of legal suits that hung over the defendant but it was not proven that they could not afford to proceed as agreed upon with the plaintiffs.

[89] In fact, this court finds conduct of dishonesty when the defendant had continued to accept the payment of money for the project even though it testified that the project was abandoned back in 2003. The defendant did not inform the plaintiffs of the status. The defendant were not honest with the plaintiffs when they had inquired so. The defendant was not honest in its reply to revert or that things would be settled when the project had long been abandoned. The defendant, in not answering the calls or when refused to accept meetings with the plaintiffs showed that they were trying to hide the truth from the plaintiffs. The defendant, in their delay and non-response to the plaintiffs had dragged them through all this time when they could have tried to resolve this matter 20 years ago. The defendant, in also refusing and/or failing to respond to the legal notice and demand from the plaintiffs *vide* their lawyers show that they were not concerned in addressing this matter. The defendant did not enter an appearance in court even when the writ was served personally on them and also delivered by AR registered post, showing their disregard and to a certain extent, disrespect of the court and our legal system. But all of this evidence did not crossover the threshold of fraud and having defrauded the plaintiffs. They may be considered when damages are

concerned, in particular aggravated damages, but this court does not find any cogent evidence that there was any fraudulent breach of trust which satisfied the above test introduced in *Twinsectra*.

[90] There was also no evidence that the defendant had planted oil palm trees on the land instead of developing the project. Evidence from some of the plaintiffs was that the land was of oil palm plantation beforehand. They said they had visited the site when the defendant had failed to deliver vacant possession; they had visited the land, and to their alarm, had not seen any construction to develop the land. Instead, it was still an oil palm plantation. The defendant's evidence was that they had not embarked on any new oil palm planting, nor did they reap any benefits from it. As such, this cannot be said to be a fraud on the defendants.

Unjust Enrichment

[91] The plaintiffs claimed that the defendant had failed to develop the project. No construction work had commenced on the land so the plaintiffs alleged that the defendant was unjustly enriched by benefitting from the oil tree plantation on the land. The defendant had stated that that was the state of the land prior to the launching of the project and the execution of the SPAs. There was no evidence adduced to satisfy this court on a balance of probabilities that there were profits made by the defendants from the oil palm plantation on the land on which the project was supposed to have been developed. So, this court dismisses the plaintiffs' claim to this.

[92] This court will not address the defendant's arguments on whether there was unjust enrichment from the purchase price paid as this must be specifically pleaded by the plaintiffs, and it was not. See the Federal Court's decision in *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557; [2018] 3 MLJ 141, *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 and *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453.

Specific Performance

[93] Reference is made to the Court of Appeal's decision in the case of *Maskiara Property Holdings Sdn Bhd v. Norisham Ibrahim* [2022] 1 LNS 266 at paras. 40 and 41:

> … From the facts, the SPA still in existence and enforceable at the time the plaintiff filed the court action against the defendant. The plaintiff never rescinds the SPA even though he had the option to do so. Federal Court in the case of *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 1 CLJ (Rep) 154; [1989] 2 MLJ 155 at p. 157 had made following observation:
>
> Finally, the New Zealand case of *Nicholas v. Ingram* [1958] NZLR 972 where the defence was based solely on financial inability to complete. We refer to the head notes. In an action for specific performance of a contract

for the sale of land, hardship on the part of the defendant may operate as a defence. But the hardship must, in general, be such as existed at the time of the contract and not such as has arisen subsequently from a change of circumstances.

The plaintiff does not agree with the defendant's interpretation of cl. 8. The vendor has a choice either to get specific performance or to get liquidated damages. Even before the full purchase price was paid the vendor gave possession of land to the purchaser who acted as if the land was his by demolishing all the buildings on the land in preparation for development.

In *Specific Performance* by Gareth Jones and William Goodhart QC under the heading 'Specific Performance Will Be Denied If Damages Are An Adequate Remedy' at p. 20 it is stated that:

The mere fact that a contract contains a liquidated damages clause, or a clause of a similar nature, is not generally an admission that the parties have agreed that damages are an adequate remedy or that one party has an option to pay or perform, specific performance will nonetheless be granted if it is the appropriate remedy ...

This point was made clear by the Privy Council in the case of *Zaibun Sa binti Syed Ahmad v. Loh Koon Moy & Anor* [1982] CLJ (Rep) 58; [1982] 2 MLJ 92. There the respondents sought specific performance of contract for the sale of land against the appellant. The learned judge decided in favour of the respondents but found that there was an oral agreement enabling the respondents to pay damages for breach. He therefore gave damages in favour of the respondents who appealed to the Federal Court seeking specific performance of the contract. The Federal Court held that the respondents were entitled to specific performance. In dismissing the appeal the *Privy Council held, inter alia, that the fact that there was an alternative claim for damages, in an action by the purchaser for specific performance* of a contract for the sale of land, could not be a fact relevant to the exercise of the discretion by the learned judge and the Federal Court was entitled to exercise its discretion and was correct in reversing the decision of the judge and ordering specific performance. As Lord Russell of Killowen in delivering the judgment of the Board at p. 94 questioned the refusal of the learned judge to grant specific performance just because the learned judge thought a sum was fixed in consideration of the purchase. He observed;

... If he thought that the fixing of the sum of $5,000 deprived him of jurisdiction to order specific performance he appears to have ignored s. 19 of the Specific Relief Act, the terms of which are as follows:

A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

We find that the plaintiff as the innocent party has the right to choose his course of action under the law. The plaintiff's action based on the reasonable reasons had acted accordingly to pursue his remedy under the specific performance … (emphasis added)

[94] This court concluded that the SPAs between the plaintiffs and the defendant are continuous and subsisting. This court minded to exercise judiciously by granting the relief prayed for by the plaintiffs as the innocent party for the specific performance by the defendant. The vacant possession must be delivered by the defendant, despite the infrastructure works not even having been commenced. This court acknowledges that time is of the essence here – the plaintiffs cannot afford to wait much longer for the defendant to construct the infrastructure works which should have commenced in 1999.

[95] This court will also grant the order that the defendant applies for the subdivision of the land and the individual titles of the bungalow plots. The defendant must also execute the transfer documents in favour of the plaintiffs upon the issuance of the individual titles. As the issuance of the individual titles is outside of the defendant's control, it is required to follow up and inquire as to the status of the applications monthly. It would be a contempt of court should this order not be complied with.

Damages

[96] The plaintiffs had sought for damages. The Court of Appeal's decision in *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784 is referred to. General damages can be granted by this court should it find that the plaintiffs had undergone pain, suffering, hardship, discomfort and mental stress, amongst others. This court grants general damages to each of the plaintiffs. The amount of general damages varies with each plaintiff as this court opines that it is reasonable to reflect from the time when each plaintiff should have received the vacant possession of their respective bungalow plots. The sum will also reflect the hardship, suffering and mental distress caused by the defendant's action and non-action in this case. This court takes into account the money paid for the respective bungalow plots. If they had not bought the bungalow plots, the present value of the amount that they had paid would be significantly higher today. For example, if a plaintiff had paid RM100,000 in 2008, the present value of that sum at 5% interest rate would be worth RM207,893 today in 2023. The quantum of general damages this court awards to the plaintiffs is significantly less than the value which they had paid then today. However, this court finds the amounts, stated in the table below, reasonable.

[97] This court will also award aggravated damages to the plaintiffs which serve as compensatory in nature. This is because the plaintiffs' ongoing loss was caused or exacerbated by the exceptional conduct of the defendant in not updating the plaintiffs on the status of the project and the bungalow lots that they had respectively purchased. The plaintiffs had only discovered that the project was abandoned in 2003 upon the proceeding of this suit in court. The defendant could have explained their situation *vis-à-vis* the project to the plaintiffs back in 2003 and resolved the matter then. Instead, the plaintiffs

had wasted 20 years of their lives and most plaintiffs here are already mature in age, worrying over their investment and frustrated over the defendant's non-performance. This court opines a sum of RM50,000 to each of the plaintiff is reasonable.

[98] Additionally, this court is minded to award exemplary damages. The conduct of the defendant is unacceptable. The contumelious disregard to the plaintiffs' concern and grief cannot be tolerated. To allow the defendant who was contractually obliged to execute their obligations, who had taken the money from the plaintiffs for the project that had long since been abandoned and then not responding to their queries, can in the simplest of forms be theft. This award of exemplary damages reflects this court's disapproval of the defendant's disrespect not only to the plaintiffs' queries and their lawyer's letters, but also this court proceedings that showed the defendant's position that it can get away with what they had done and not done with no repercussions. This court awards a reasonable sum of RM50,000 to each of the plaintiffs.

The Orders Of This Court

[99] After much deliberation and the assessment of the evidence to come to a finding of the facts above together with the applicable laws, this court hereby makes the following orders:

(i) a declaration that the first plaintiff until 11th plaintiff have a beneficial interest over the respective lands and the rest entitled for the right *ad rem* over or right *in personam* against the defendant over the subject matter;

(ii) a declaration that the defendant hold the respective bungalow plots as a bare trustee for the first to 11th plaintiffs respectively;

(iii) an order that the defendant delivers vacant possession of the respective bungalow plots to the plaintiffs within 14 days from the date of this judgment;

(iv) an order that the defendant applies for the division of the land as per the respective SPAs within 14 days from the date of this judgment;

(v) and order that the defendant pursues the status on a monthly basis until the issuance of the subdivision of land the respective individual titles for the bungalow plots;

(vi) an order that the defendant executes the respective transfer documents in favour of the plaintiffs within 14 days of the issuance of the individual titles of the bungalow plots;

(vii) damages as tabulated below:

Plaintiff	General Damages	Aggravated Damages	Exemplary Damages	Total
1 & 2	RM120,000	RM50,000	RM50,000	RM220,000
3 & 4	RM70,000	RM50,000	RM50,000	RM170,000
5	RM70,000	RM50,000	RM50,000	RM170,000
6	RM70,000	RM50,000	RM50,000	RM170,000
7	RM50,000	RM50,000	RM50,000	RM150,000
8	RM60,000	RM50,000	RM50,000	RM160,000
9	RM50,000	RM50,000	RM50,000	RM150,000
10	RM70,000	RM50,000	RM50,000	RM170,000
11	RM50,000	RM50,000	RM50,000	RM150,000
12 x 2	RM50,000	RM50,000	RM50,000	RM150,000
13	RM80,000	RM50,000	RM50,000	RM180,000
14	RM30,000	RM50,000	RM50,000	RM130,000
15	RM40,000	RM50,000	RM50,000	RM140,000
16	RM110,000	RM50,000	RM50,000	RM210,000
17 & 18	RM30,000	RM50,000	RM50,000	RM130,000
19	RM30,000	RM50,000	RM50,000	RM130,000
20	RM20,000	RM50,000	RM50,000	RM120,000
21 x 2	RM40,000	RM50,000	RM50,000	RM140,000
22	RM70,000	RM50,000	RM50,000	RM170,000
23	RM60,000	RM50,000	RM50,000	RM160,000
24	RM70,000	RM50,000	RM50,000	RM170,000
25	RM30,000	RM50,000	RM50,000	RM130,000

(viii) interest of 5% on the judgment sum from the date of this judgment until full and final settlement.